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Court Of Appeal Rules On Procedural Compliance Requirements Before Commencing An EGM

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Recently, the Court of Appeal in *Abdul Malek Faisal bin Mohd Hyffny v Shaikh Marikhzan Jalani & 2 Ors* held that a shareholder's resolution passed in an extraordinary general meeting (EGM) to remove the chairperson and director of the company was invalid as the procedural requirements were not met.

Background Facts

Minsyam Sdn Bhd had 4 shareholders who were split into 2 groups, each comprising an equal number of voting shares for the purposes of the EGM.

The group was split into two divisions: (i) Mohd Radzee bin Abdullah and Abdul Malek, who the Chairman and a director of the company; and (ii) Shaikh Markhza and Syed Zainal. The latter group called for an EGM to vote on the removal of Abdul Malek as the Chairman and director of the company.

Section 329 of the Companies Act 2016 and Article 49 of the company's constitution provide that the Chairman shall preside as the chairperson at every general meeting of the Company and if the Chairman was not present within 15 minutes after the time for the holding of the meeting, the members present shall elect one of their members to be the chairperson of the meeting.

The EGM was scheduled to take place at 10.30 am on 9 March 2020 where Shaikh Markhzan appointed himself as the chairman and together with the proxy for Syed Zainal voted for the removal of Abdul Malek as director and chairman of the Company. The meeting ended at 10.41 am.

This led to Abdul Malek seeking a declaration from the High Court that the resolution passed at the EGM was invalid, null and void.

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The High Court dismissed Abdul Malek's application primarily on the following grounds:

- (i) Abdul Malek did not establish that he was at the EGM by 10.45am (i.e. within the 15 minutes window provided for in the company's constitution and the CA 2016).
- (ii) In any event, the non-compliance with the waiting period of 15 minutes was a procedural irregularity that was curable as the outcome of the voting would have been the same regardless of Abdul Malek's presence in the meeting.

Abdul Malek appealed against this decision to the Court of Appeal.

Whether The EGM Was Wrongly Convened?

Upon analysing the provisions of the company's constitution as well as Section 329 of CA 2016, the Court of Appeal held that the members of the company were bound to comply with the 15 minutes waiting time requirement and by failing to do so, Abdul Malek had been deprived of his right to be present as he was allowed until 10.45 am to be present at the EGM and to have the right to chair the EGM given that he was at the material time the Chairman of the board at the material time.

The Court of Appeal found that the High Court erred in concluding that the company secretary was permitted to proceed with the convening of the meeting at 10.35 am and concluding it at 10.41 am. The mandatory language of '*shall*' in both the company's constitution and Section 329 of the CA 2016 cannot be ignored merely because the two shareholders were unable to wait. The fact that the company secretary gave the go-ahead for the meeting to convene does not make the meeting valid as the contractual and statutory requirements have not been complied with.

In other words, strict compliance to both Section 328 (relating to quorum) and Section 329 (dealing with the presence of the Chairman) of the CA 2016 are expected when convening a meeting.

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Whether The Irregularity Could Be Cured?

Section 582 of the CA 2016 provides that no proceeding shall be invalidated by any defect, irregularity or deficiency “*unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court*”.

The Court of Appeal in consideration of this issue observed that the director to be removed, in this case, Abdul Malek who was also a shareholder of the company, had every right to be heard as part of the rules of natural justice, before a vote is taken. The Court referred to Section 207 of the CA 2016 which bestows upon the director, a right to make oral or written representation on the resolution to remove him. Additionally, the Court also added that in exercising its discretion, is duty-bound to consider the severity and repercussions of the resolution sought in the light of the factual matrix and context of the shareholders’ disputes.

Below is an extract of the relevant ruling:

“[67] The director to be removed, in this case, the plaintiff who is also a shareholder of the Company, had every right to be heard as part of the rules of natural justice, before a vote is taken. This was alluded to and affirmed in by the Court of Appeal in Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd [2008] 3 MLJ 653 at p.669 as follows: “.....The notice requirement in s 128 sufficiently meets the element of fairness as it makes the director concerned aware of the fact that there is a proposal to remove him or her. It is then up to the director concerned to prepare representations setting out the reasons why he or she should not be removed, eg, because he or she has always acted in the best interests of the company. He or she may then attend the general meeting and make an oral address answering his or her critics, if any. This, then, is the content of the rules of natural justice in the context and circumstances encapsulated in s 128 of the Act. The setting out of the grounds for

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proposing the removal is not a requirement of s 128.....”

Conclusion

The Court of Appeal’s ruling emphasises the importance of strict compliance with procedural requirements before a meeting can be validly held and commenced.

Although there is a curative provision under section 582 of the CA 2016, the Court will nevertheless look at the particular facts and potential repercussions of the resolution in deciding on the injustice between the parties.

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